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9 Counsel for Tri-State Livestock Credit Corporation

10 **UNITED STATES BANKRUPTCY COURT**

11 **DISTRICT OF NEVADA**

12 In re

13 Case No. BK-N-11-52345

14 DOUBLE U LIVESTOCK, LLC,

15 Chapter 12

16 Debtor.

17 **MOTION TO PROHIBIT USE OF CASH
 18 COLLATERAL, OR IN THE
 19 ALTERNATIVE, MOTION FOR
 20 ADEQUATE PROTECTION**

21 Hearing Date: OST Requested
 22 Hearing Time: OST Requested
 23 Est. Hearing:

24 Secured Creditor Tri-State Livestock Credit Corporation, a California corporation ("Tri-
 25 State"), by and through its undersigned counsel, hereby moves this court for an order prohibiting
 26 Debtor Double U Livestock, LLC's use of Tri-State's cash collateral, or in the alternative, motion
 27 for adequate protection. This motion is supported by the following Memorandum of Points and
 28 Authorities, the concurrently-filed supporting declaration of Robert Bergsten (the "Bergsten
 Declaration"), the concurrently-filed supporting declaration of Amy N. Tirre (the "Tirre
 Declaration"), all pleadings and papers of record, and any oral arguments of counsel at the hearing
 on this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M) and is a contested matter pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure.

II. RELEVANT FACTS AND BACKGROUND

A. Loan and Documents

On or about February 19, 2008, Debtor and Tri-State entered into a Renewal Promissory Note in the principal amount of \$1,518,363.00 payable to Tri-State, executed by James A. West, Carleen J. West, Clayton J. West, Mary West, Wade S. West and Molly West, in their capacities as members of the Debtor as well as individually. A copy of the Renewal Promissory Note is attached to concurrently filed Bergsten Declaration as **Exhibit 1**.

The relationship of the debtor and Tri-State started in late 2002 and the first loan was made in early 2003. Bergsten Declaration at ¶4. At that time, Debtor was moving its operation from Oregon to Nevada and Tri-State was willing to provide an operating loan for operations that was secured by only personal property at the beginning, but would eventually be additionally secured by real and BLM leasehold property. *Id.* Tri-State's lien is in second position behind the Paris Trust on a part of the real property and in first position on another part of the real property. *Id.* The Renewal Promissory Note is the fifth renewal (sixth loan) to Debtor; the renewal loans were usually renewed in increasing amounts to advance funds to Debtor due to operating losses and a need for capital improvements to ostensibly be able to increase the future cash flow and success. As set forth below, there was cash flow improvement in 2008 through 2010, but not enough to adequately service the growing magnitude of the total debt. Tri-State's first loan to Debtor was evidenced by a note dated January 14, 2003 in the amount of \$175,000.00. *Id.*

1 On February 19, 2008, a Loan Agreement was executed in favor of Tri-State executed by
2 James A. West, Carleen J. West, Clayton J. West, Mary West, Wade S. West and Molly West, in
3 their capacities as members of the Debtor as well as individually. A copy of the Loan Agreement
4 is attached to the concurrently filed Bergsten Declaration as **Exhibit 2**.

5 Tri-State is secured by a Deed of Trust, Assignment of Rents, and Security Agreement
6 dated February 26, 2007, recorded as Document No. 572088 on April 27, 2007, in the Elko
7 County Recorder's Office, against Debtor's real property located in Elko County with APN 007-
8 160-015. A true and correct copy of the Deed of Trust is attached to the Bergsten Declaration as
9 Exhibit 3.

11 Tri-State is secured by a Deed of Trust, Assignment of Rents, and Security Agreement
12 dated February 26, 2007, recorded as Document No. 337216 in Book No. 473 at Page No. 493 on
13 April 27, 2007, in the White Pine County Recorder's Office, against Debtor's real property located
14 in White Pine County with APNs 008-230-001 through -003 and APN 008-240-001. A true and
15 correct copy of the Deed of Trust is attached to the Bergsten Declaration as **Exhibit 4**.

17 Tri-State is secured by a Deed of Trust, Assignment of Rents, and Security Agreement
18 dated February 26, 2007, recorded as Document No. 0128841 in Book No. 231 at Page No. 0038
19 on April 27, 2007, in the Lincoln County Recorder's Office, against Debtor's real property located
20 in Lincoln County with APN 010-220-02. A true and correct copy of the Deed of Trust is attached
21 to the Bergsten Declaration as **Exhibit 5**.

23 The parties entered into a Security Agreement dated February 19, 2008, whereby Debtor
24 granted to Tri-State a security interest in, inter alia, all Debtor's crops, farm products, equipment,
25 inventory, accounts, documents, chattel paper, instruments, contracts, and general intangibles now
26 owned or hereafter acquired; all livestock, interest in livestock or its born or unborn progeny,
27 leasehold interests in livestock, and all livestock feed, now owned or hereafter acquired by the
28

1 Debtor, including but not limited to additions, replacements and increases; and all equipment,
 2 feed, hay, grain, fodder, ensilage, chemicals, fertilizers, medicines and supplies used in Debtor's
 3 farming or livestock operations now located or hereafter to be located on properties owned or
 4 leased by the Debtor; and all products of the above collateral and all proceeds from sale of said
 5 collateral or products ("Personal Property Collateral"). A true and correct copy of the Security
 6 Agreement is attached to the concurrently filed Bergsten Declaration as **Exhibit 6**.
 7

8 Tri-State perfected its security interest in the Collateral by filing a UCC-1 Financing
 9 Statement with the Nevada Secretary of State's Office on January 29, 2003 as Document No.
 10 2003002936-3, a UCC-1 Continuation Statement as Document No. 2007036260-8 on November
 11 2, 2007 and an Amendment as Document No. 200770370361-7 on November 8, 2007. A true and
 12 correct copy of the UCC-1 Financing Statement and the Amendment are attached to the
 13 concurrently filed Bergsten Declaration as **Exhibits 7 and 8**, respectively.

14 **B. Payment History and Background**

15 Tri-State has a first-priority security interest in all of Debtor's personal property assets,
 16 including its livestock (sheep), hay, leases, AUM's, and equipment. Tri-State has a second deed
 17 of trust against Debtor's real property. Debtor has failed to make any payments to Tri-State in
 18 2009 and 2010 despite the fact that the loan came due on January 6, 2009. Bergsten Declaration at
 19 ¶13.

20 As of the petition date, July 21, 2011, the amount of Tri-State's claim was \$1,960,169.08,
 21 which consists of \$1,542,651.14 in principal, \$397,648.94 in accrued interest and \$19,869 in
 22 expenses. Bergsten Declaration at ¶14. The interest rate is 7.75% per annum. *Id.* This 7.75%
 23 interest rate was adjustable and decreased from the note's initial interest rate of 9.25%. Tri-State,
 24 while it could have, has never invoked the plus 2% default rate option or the current accrual rate
 25 could now be 9.75%. Interest-only annual payments at 7.75% on the principal amount of
 26
 27
 28

1 \$1,542,651.14 would be in the amount of \$119,555.46. Interest only payments at 7.75% on the
 2 principal plus accrued interest plus expenses as of the day of filing would be \$154,350.00. *Id.*

3 Over the years that the loan from Tri-State was renewed, Debtor's payments never
 4 approximated even an interest-only payment. Bergsten Declaration at ¶15. According to Mr.
 5 Bergsten, Debtor made a payment of \$22,986.39 in 2005, \$447,848.18 in 2006, \$79,957 in 2007,
 6 and \$9,087.38 in 2008. *Id.* Tri-State received no payments in 2009 and 2010. *Id.*

7 In fact, on March 31, 2011, Tri-State advanced the payment due to the holder of the first
 8 deed of trust against the Debtor's real property, Peter and Rama Paris Family Trust, in the amount
 9 of \$104,628 so that it would not go into default. Bergsten Declaration at ¶17.

10 **C. Post-Petition Use of Cash Collateral**

11 On August 11, 2011, undersigned counsel sent a letter to Debtor's counsel notifying
 12 Debtor that Tri-State did not consent to the use of its cash collateral without a mutually-agreed
 13 upon stipulation and budget. Tirre Declaration at ¶2 and Exhibit 1 thereto. Over the past two and
 14 one-half months, the parties attempted to reach terms for a cash collateral stipulation but were
 15 unable to do so. Tirre Declaration at ¶8. On September 8, 2011, undersigned counsel sent a letter
 16 to Debtor's counsel authorizing the use of its cash collateral through October 2011 based upon a
 17 budget that was forwarded by Debtor's counsel on or about August 20, 2011. Tirre Declaration at
 18 ¶¶3-4 and Exhibits 2 and 3 thereto.

19 On October 6, 2011, Debtor deposited \$228,684.99 into its checking account with Nevada
 20 Bank & Trust. Exhibit 6 to Tirre Declaration. It is undersigned counsel's understanding that these
 21 funds came from the sale of some lambs, which occurs on an annual basis. Debtor's counsel
 22 provided a budget for Tri-State's approval on or about October 9, 2011. A copy of Debtor's
 23 budget is attached to the Tirre Declaration as Exhibit 4. On October 17, 2011, undersigned
 24 counsel sent a letter to Debtor's counsel advising that Tri-State does not consent to the use of its
 25 budget. Exhibit 7 to Tirre Declaration. On October 18, 2011, undersigned counsel sent a letter to
 26 Debtor's counsel advising that Tri-State does not consent to the use of its budget. Exhibit 8 to
 27 Tirre Declaration. On October 19, 2011, undersigned counsel sent a letter to Debtor's counsel
 28 advising that Tri-State does not consent to the use of its budget. Exhibit 9 to Tirre Declaration.

1 cash collateral as proposed in the budget. Tirre Declaration at ¶6 and Exhibit 5 thereto.

2 Debtor has no authority to use Tri-State's cash collateral on or after November 1, 2011 and
 3 therefore, seeks an order prohibiting Debtor's use of Tri-State's cash collateral.

4 **III. LEGAL ARGUMENT**

5 Tri-State has a perfected security interest in inter alia, all Debtor's crops, farm products,
 6 equipment, inventory, accounts, documents, chattel paper, instruments, contracts, and general
 7 intangibles now owned or hereafter acquired; all livestock, interest in livestock or its born or
 8 unborn progeny, leasehold interests in livestock, and all livestock feed, now owned or hereafter
 9 acquired by the Debtor, including but not limited to additions, replacements and increases; and all
 10 equipment, feed, hay, grain, fodder, ensilage, chemicals, fertilizers, medicines and supplies used in
 11 Debtor's farming or livestock operations now located or hereafter to be located on properties
 12 owned or leased by the Debtor; and all products of the above collateral and all proceeds from sale
 13 of said collateral or products ("Personal Property Collateral").

14 Pursuant to Section 363(a), the term "cash collateral" means "cash" and "the proceeds,
 15 products, offspring, rents, or profits of property." To the extent that Debtor has sold lambs and/or
 16 hay and has received payment therefore, the sale proceeds constitute Tri-State's cash collateral.

17 This Court should prohibit the Debtor's use of Tri-State's cash collateral. Section
 18 363(c)(2) of the Bankruptcy Code provides that the debtor may not use cash collateral unless: "(A)
 19 each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a
 20 hearing, authorizes such use, sale, or lease in accordance with the provisions of this section."

21 Tri-State does not consent to the use of its cash collateral and Debtor has not filed a
 22 motion for authority to use Tri-State's cash collateral. The monies received from the sale of Tri-
 23 State's collateral, e.g., lambs and hay, constitute Tri-State's cash collateral. Tri-State only
 24 authorizes the following payments from its cash collateral in November and December 2011:

NOVEMBER Expenses	Amount
Real Estate Taxes	\$1,026

1	Hired Labor	\$5,400
2	Labor Groceries	\$2,500
3	Fuel	\$3,000
4	Repairs & Maintenance	Est. \$2,000
5	Supplies	\$2,800
6	Utilities	\$400
7	TOTAL:	\$17,126

10	DECEMBER Expenses	Amount
11	BLM Fees	\$4,050
12	Wade West Wage	\$1,500
13	Hired Labor	\$7,600
14	Labor Groceries	\$2,500
15	Fuel	\$3,000
16	Repairs & Maintenance	Est. \$1,500
17	Supplies	\$2,800
18	Utilities	\$2,900
19	TOTAL:	\$25,850

The foregoing payments are what Tri-State deems necessary to preserve its collateral. Debtor should not be permitted to make payments that support a going concern because its operation is not financially viable.

As set forth above, in January 2003, Tri-State made a loan to Debtor when Debtor moved its livestock operation from Oregon to Nevada. Debtor had financial problems from the inception and they are continuing. Bergsten Declaration at ¶11. Tri-State kept renewing the loan in increasing amounts with the expectation that Debtor's cash flow would improve in order to service

1 the debt. *Id.* Nine years later Debtor still does not have a sufficiently positive cash flow to
 2 service (even if re-amortized) Tri-State's debt and all of the approximate \$3.2 million of secured
 3 debts that it has built-up over the nine year period of time. *Id.*

4 The 2010 cash flow available to service debt is \$265,071, and even if Debtor has that same
 5 amount available to service debt for 15 years into the future (See Exhibit 9 to Bergsten
 6 Declaration), it is not sufficient to fund necessary replacement capital expenditure Estimated at
 7 \$50,000 per year and make existing secured loan debt service payments of \$350,000 for those 15
 8 years. Bergsten Declaration at ¶12. Even if the 2010 cash flow was repeated for 15 years in a row
 9 without fail, it would be short about \$135,000 per year of producing this adequate cash flow. *Id.*
 10 Over the 15 years suggested, cash flow to service debt would be a total of approximately \$2
 11 million short of that needed. Debtor's operation is not financially viable given the amount of debt
 12 now existing. *Id.*

13 As of October 21, 2011, Debtor had a balance of \$207,300.01 in its bank account. Tri-
 14 State's consents to Debtor retaining \$10,000 for on-going expenses for January 2012 forward, but
 15 requires that the balance of the cash after payment of November and December 2011 approved
 16 expenses (set forth above) be turned over to Tri-State. Tri-State estimates that the cash turned
 17 over to it should be in the amount of \$154,324.

18 Further, Debtor should be required to provide the following:

- 19 • Monthly bank-account statements with all back-up documentation so that Tri-
 20 State's cash collateral is segregated and accounted for.
- 21 • All documents evidencing the expenses set forth in Debtor's October 9, 2011
 22 budget.
- 23 • All documents showing the number or headage of ewes, rams and lambs sold in
 24 September 2011 and/or October 2011, including the weights and sale prices.
- 25 • All documents showing the number or headage of ewes, rams and lambs remaining
 26 in Debtor's possession as of October 6, 2011, after Debtor deposited \$228,684.99
 27 into its checking account with Nevada Bank & Trust.
- 28 • All documents showing the tonnage of harvested and unsold hay in Debtor's
 29 possession after October 6, 2011.

In the event this Court authorizes the Debtor's use of Tri-State's cash collateral over Tri-State's objection then Tri-State requests adequate protection pursuant to 11 U.S.C. § 361. Section 361 provides:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by- (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Debtor should pay Tri-State cash payments of \$10,000 per month to protect Tri-State's interest in its cash collateral as long as Debtor is permitted to use Tri-State's cash collateral.

IV. CONCLUSION

15 WHEREFORE, Tri-State Livestock Credit respectfully requests the Court to enter an order
16 on an emergency basis: (i) prohibiting the Debtor's use of Tri-State's cash collateral and requiring
17 the Debtor to segregate and account for and turn over Tri-State's cash collateral; (ii) alternatively,
18 providing Tri-State with adequate protection; and (iii) granting Tri-State any additional relief as
19 the Court deems appropriate.

LAW OFFICES OF AMY N. TIRRE, APC

By: /s/ Amy N. Tirre
AMY N. TIRRE, ESQ.

Counsel for Tri-State Livestock Credit Corporation

CERTIFICATE OF SERVICE

Pursuant to FRBP 7005 and FRCP 5(b), I certify that I am an employee of Law Offices of Amy N. Tirre, that I am over the age of 18 and not a party to the above-referenced case, and that on October 25, 2011 I filed the **MOTION TO PROHIBIT USE OF CASH COLLATERAL, OR IN THE ALTERNATIVE, MOTION FOR ADEQUATE PROTECTION** as indicated:

x **BY NOTICE OF ELECTRONIC FILING:** through Electronic Case Filing System of the United States Bankruptcy Court, District of Nevada, to the individuals and/or entities at their email addresses as set forth below:

- M NELSON ENMARK nenmark.trustee@gmail.com
 - MICHAEL LEHNERS michaellehners@yahoo.com
 - KAARAN E. THOMAS kthomas@mcdonaldcarano.com,
mmorton@mcdonaldcarano.com
 - JOHN WHITE bankruptcy@whitelawchartered.com,
john@whitelawchartered.com;jen@whitelawchartered.com

BY HAND DELIVERY VIA COURIER: by causing hand delivery of the Document listed above via Reno Carson Messenger Service to the persons at the addresses set forth below.

BY MAIL: by placing the document listed above in a sealed envelope with Postage thereon fully prepaid in the United States Mail at Reno, Nevada, and addressed as set forth below. I am readily familiar with my office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on 25 October 2011, with postage thereon fully prepaid in the ordinary course of business.

DATED this October 25, 2011.

/s/ Andrea Black